Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

LAURENE CUVILLIER,

Petitioner,

v.

ROCKDALE COUNTY, GEORGIA,
DELINQUENT TAX SOLUTIONS, INC.,
ALICE EDGE and DANIEL G. RAY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the governmental entity and its subcontractors to take meaningful steps to provide notice of a tax foreclosure sale beyond checking tax and deed records by exercising due diligence in pursuing every reasonably available channel of information.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-8) is reported at 390 F.3d 1336. The opinion of the district court (App., *infra*, 9-19), which granted respondents' motion for summary judgment is unreported.

JURISDICTION

The court of appeals' judgment was entered on November 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. Amendment 14, Sec. 1.

STATEMENT

This case raises important, recurring questions relating to the notice required to be given under the Fourteenth Amendment's Due Process Clause before a tax sale can be conducted. Ever since *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950), this Court has required "notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314,

70 S.Ct. at 657. This Court cautioned that, "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* This Court has never backed away from these principles. *Dusenbery v. United States*, 534 U.S. 161, 168, 122 S.Ct. 694, 700 (2002).

These broad principles have perhaps inevitably led to conflicting opinions in the state and federal courts as the Courts struggle with the specifics of providing adequate notice. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 Ind. L.J. 747, 750 (2000). As he points out, "[T]here is virtually no consensus among the state and local taxing jurisdiction on the application of [this] constitutional requirement []." *Id.* and "The wildest range of interpretation occurs with respect to the. . . . question – the nature and scope of the reasonably diligent efforts which must be undertaken to identify correct names and addresses of parties holding the various protected property interests." *Id.* at 751.

The first conflict identified by Alexander is "the scope of the government's duty when notice is mailed to the last known address available from the public records and is returned as undeliverable." *Id.* at 792. The conflict is whether checking available tax records and deed records is enough. *Id.* at 792-793.

What further efforts must be taken is another source of conflict, and it is the conflict which is squarely raised by this petition.

In this case, petitioner never received notice that her home was to be sold at tax sale in July 2002 (R 2-30, affidavit of Cuvillier). She had not lived at 765 Clubhouse Drive since September 2000. Nevertheless, she continued

to receive mail from Rockdale County, including mail from the Rockdale County Voters Registration Department and from the Rockdale County Water Department (*Id.*). She did not receive any notice of tax sale (*Id.*), and there is no record that she did (R 2-46-13). At the time of the tax sale, Rockdale County did not post a notice on her property (R 2-48-19). At the time of the tax sale, plaintiff had employed a real estate agent (R 2-30-affidavit). The County never contacted her, although her sign was on the property (R 2-30, affidavit).

Delinquent Tax Solutions, Inc. (DTSI) had agreed with Rockdale County to do skip tracing. Ms. Yaun stated she checked three databases, YellowPages.com, White-Pages.com, and PeopleSearch.com.[1]

Jerry D. Freeland, who had acted as a skip tracer for 30 years gave a statement under penalty of perjury and stated in pertinent part (R 2-30):

> I reviewed Ms. Yaun's deposition testimony. She said that she looked at the RealYellowPages.com, but that database would not have provided any information in looking for an individual, since it only contains listings on businesses.
>
> The WhitePages.com would access the information in the phone book for residences and would only work if the debtor had a phone number in their name which was a listed phone number, and if the person accessing the WhitePages.com knew the city in which the debtor lived.
>
> It would have been relatively easy to determine the Plaintiff's present address. I did so in three

[1] *See* App. 4 *infra*. at fn. 3.

> minutes, without being informed of any information other than her previous name of Anne J. Harrison and her previous address of 765 Clubhouse Dr., Conyers, GA. If I had skiptraced for her a year ago, it would have taken the same amount of time.

Moreover, the conflict cited above is apparent between the opinion of the Georgia Supreme Court which requires "due diligence in pursuing every reasonably available channel of communication," *Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 84 (Ga. 2003), and the Eleventh Circuit opinion in this case (App. 6 *infra*.) which required "any effort to determine the proper address."

This issue merits further review.

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict with the decision of the Georgia Supreme Court in *Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81 (Ga. 2003) and extends the conflict among the various state and federal courts. A party's constitutional rights ought not to depend on whether she seeks to enforce those rights in federal court or in state court.

Review of this case would allow the Court to bring uniformity to case law that has in the words of Alexander "virtually no consensus" and "[t]he wildest range of interpretation." Alexander, *supra* at 750-751.

I. BECAUSE COURTS HAVE REACHED DIFFERING CONCLUSIONS ABOUT WHAT THE DUE PROCESS CLAUSE REQUIRES OF THE STATE WHEN IT SEEKS TO PROVIDE NOTICE OF A TAX SALE, THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE ADEQUACY OF THE NOTICE PROVIDED HEREIN

As Alexander, *supra*, notes, "[T]here is virtually no consensus among the state and local taxing jurisdictions on the application of [this] constitutional requirement []." *Id.* and "The wildest range of interpretation occurs with respect to the. . . . question – the nature and scope of the reasonably diligent efforts which must be undertaken to identify correct names and addresses of parties holding various protected property interest." *Id.* at 751. *Compare Plemons v. Gale*, 2005 WL 263658 (4th Cir. 2005).

The Eleventh Circuit's opinion, *see* App. 8, *infra.*, basically follows the minority view, *see Alexander*, *supra* at 792-793, except for its holding that checking two databases that would not provide data is the added diligence that provide notice. *See Giacobbi v. Hall,* 707 P.2d 404, 408 (Ida. 1985).

What would a diligent search have consisted of? The government and DTSI could have inspected the premises where they would have found the realtor's sign. *See Gacki v. La Salle Nat. Bank*, 669 N.E.2d 936, 938-939 (Ill.App. 1996); *O'Brien v. Port Lawrence Title & Trust Co.*, 688 N.E.2d 1136, 1145 (Ohio Com. Pl. 1997). They might have posted a notice. *See Kester v. Ives*, 960 P.2d 865 (Okla. App. 1998); *Patrick v. Rice*, 814 P.2d 463, 468 (N.M.App. 1991). They might have checked the utility and voting records (R 2-30, affidavit of Cuvillier); *Harrison v. Lenoir*,

745 So.2d 1191 (La.App. 1999). Or the diligent search could have been akin to the search that Mr. Freelander himself did, which uncovered the results in three (3) minutes. *Compare*, *District of Columbia v. Mayhew*, 601 A.2d 37 (D.C. 1991).

Once the notice came back as unclaimed, it was a red flag for some further action. *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992); *Plemons*, *supra*. There is, of course, no formula in providing due process notice. The touchstone is still *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657,

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

As Alexander, *supra*, points out, the cases are in hopeless disarray as to what a reasonably diligent further action is or whether even going beyond the public records is even required. In 22 years, this Court's *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706 (1983) opinion has been cited 782 times (as of February 5, 2005) and it is not a stretch to note that there are numerous interpretations. The instant case offers an opportunity to bring order out of chaos. *See Dusenbery*, *supra*, 534 U.S. at 166-167, 122 S.Ct. at 699.

II. BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISION OF THE GEORGIA SUPREME COURT, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT

The decision of the Eleventh Circuit herein is in direct conflict with the decision of the Georgia Supreme Court in *Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81 (Ga. 2003).

There, service was made to the address to be redeemed, but the Sheriff only found a tenant. Service was then made by publication because the trial court held,

> The only address of [plaintiff] on file with the county tax authorities was that of the condo and neither appellee or its predecessor had any actual knowledge of and the real estate records did not contain, any other address.

Id. at 83. "[N]o further extraordinary efforts to locate the delinquent taxpayer [were] required," the trial court held. After discussing the case law from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) through *Dusenbery v. United States*, 534 U.S. 161 (2002), the Court explained,

> The Supreme Court did not alter the current constitutional standard, which is that the notices must be sent to those interested parties whose names and addresses are ascertainable by 'reasonably diligent efforts.'

That is,

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. . . . Thus the person giving the constitutionally required notice must exercise **due diligence in pursuing every reasonably available channel of information.**

(emphasis added) 589 S.E.2d at 84.

More is needed than mailing an undeliverable letter to the last known address as happened herein. 589 S.E.2d at 85. On summary judgment, defendant was required to present evidence of

> any effort to ascertain [plaintiff's] address from any source other than the tax and deed records [and] **that other channels of information were not reasonably available or that use of them would have been 'impractical or fruitless.'**

Id.

Of course this showing was not made herein. The standard applied by the Eleventh Circuit, *see* App. 6, that the government and DTSI "failed to take **any** effort to determine the proper address" is hardly the same as "due diligence in pursuing every reasonably available channel of information," 589 SE.2d at 84, let alone showing

> that other channels of information were not reasonably available or that use of them would have been 'impractical or fruitless.'

Id. at 85. The flat conclusion at App. 8 fn. 8 that these efforts complied with *Hamilton* and represent "reasonably diligent efforts beyond the use of tax and real estate records" is completely at odds with *Hamilton*. This Court should grant the writ of certiorari to resolve this conflict. *See e.g. Florida v. White*, 526 U.S. 559, 563, 119 S.Ct. 1555, 1558 (1999); *United States v. Estate of Romani*, 523 U.S. 517, 521, 118 S.Ct. 1478, 1482 (1998).

III. BECAUSE THE COURT OF APPEALS HAS MISCONSTRUED *MULLANE*, *MENNONITE*, AND *DUSENBERY* AND IS OUT OF LINE WITH SUPREME COURT AUTHORITY, THIS COURT SHOULD GRANT CERTIORARI TO CORRECT SUCH MISINTERPRETATION

From *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 692 (1950), until today, this Court

has determined whether due process has been afforded under a straightforward test.

> An elementary and fundamental requirement of due process in any proceeding which is to be awarded finality is notice reasonably calculated, under all the circumstances, to oppose interested parties of the pendency of the action and afford them an opportunity to present their objections.

339 U.S. at 314, 70 S.Ct. at 657. Without setting out specific requirements, this Court cautioned,

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id.

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706 (1983), this Court ruled that due process required actual notice of a tax sale of property. This Court further ruled that posting and publishing a notice was inadequate notice to the mortgagee.

At footnote four (4), this Court "assume[d] that the mortgagee's address could have been ascertained by reasonably diligent efforts." Except for stating that "extraordinary efforts," *id.*, were not necessary, this court did not set out any standards whatsoever, except to make clear that the State must make some effort "to discover the identity and the whereabouts of a mortgagee whose identity is not in the public record." *Id.*

What is noteworthy about *Mennonite*, is the understanding that there are general principles "applicable whenever any legally protected property interest may be

adversely applied" 462 U.S. at 802, 103 S.Ct. at 2713 (O'Connor, J. dissenting).

The problem is that there is no uniformity in the application of these principles; this case offers the opportunity to bring uniformity.

In *Dusenbery v. United States*, 534 U.S. 161, 122 S.Ct. 694 (2002), this Court revisited the issue of notice and reaffirmed *Mullane*, 534 U.S. at 167, 122 S.Ct. at 699. This Court held that the notice to Mr. Dusenbery was "reasonably calculated under all the circumstances" to apprise him of the pendency of the cash forfeiture. And the Court corrected a misreading of *Mennonite*,

> It does not say that the State **must provide** actual notice, but that it must attempt to provide actual notice.

534 U.S. at 170, 122 S.Ct. at 694.

What petitioner received in this case was the "mere gesture" not "due process." *Mullane*, *supra*, 339 U.S. at 314, 70 S.Ct. at 657. Indeed, petitioner did not even receive the notice that posting on her property would bring, (R 2-48-19), and the Court has repeatedly found such notice inadequate. *See e.g. Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279 (1962); *Compare Patrick v. Rice* 814 P.2d 463, 468 (N.M.App. 1991). The County did not drive by her property, although there was a sign on the property with a real estate agent's number (R 2-30). DTSI, the private company contracted to provide notice, could

1) Obtain a social security number;

2) Obtain a date of birth;

3) Check with any state agency or other Rockdale County Department;

4) Ask any Rockdale County employee for assistance;

5) Drive by the property;

6) Ask at the post office if there was a forwarding address;

7) Leave any note or sign posted on the property.

It took none of these steps.

DTSI had contracted with the County to do skip tracing, but DTSI did no skip tracing. Again, it provided "mere gestures." A witness, whose statement under penalty of perjury was part of the record (R 2-30), was able to determine petitioner's address in three (3) minutes "without being informed of any information other than her previous name of Anne J. Harrison and her previous address of 765 Clubhouse Dr., Conyers, Ga.

The notice given to petitioner was certified mail notice. The letters came back. The County officers then gave the address to DTSI, even though the letters came back (R 3-48-9). The means of giving notice to petitioner were not "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane, supra*, 339 U.S. at 314, 70 S.Ct. at 657. This was not an "attempt to provided actual notice," *Dusenbery, supra*, 534 U.S. at 170, 122 S.Ct. at 694 but "mere gesture," *Mullane, supra*, 339 U.S. at 314, 70 S.Ct. at 657.

The Eleventh Circuit Court of Appeals did not apply the standards from this Court's precedent. *See* App. 6,

> those cases involved situations where the government either knew the defendant's proper address or, upon receipt of the returned notice, **failed to take any efforts to determine the proper address.**

(emphasis added). This is a far cry from this Court's admonition in *Mullane* and *Dusenbery*.

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane, supra, 339 U.S. at 314, 70 S.Ct. at 657. *Dusenbery, supra*, 534 U.S. at 168, 122 S.Ct. at 700. *Eisen v. Carlisle*, 417 U.S. 156, 174, 94 S.Ct. 2140, 2151 (1974); *Covey v. Town of Somers*, 351 U.S. 141, 146, 76 S.Ct. 724, 727 (1965). *Plemons v. Gale*, 2005 WL 263658 (4th Cir. 2005) at fn. 4.

The steps the Court cites at App. 6-7 do not purport to meet the *Mullane – Dusenbery* standard either. It is not enough to check the local deeds and records and the performance of DTSI must also comport with this standard. The complaint about DTSI is that those efforts were not reasonably calculated to find petitioner, not that they were not the best efforts. *See* Freeland statement under penalty of perjury; R 2-30. Surely, if a skip tracer could find petitioner in three (3) minutes, a jury could find that respondents might have at some point.[2]

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[2] The Eleventh Circuit held that the search of "WhitePages.com" and "RealYellowPages.com" was adequate, *see* App. at 3-4 and particularly fn. 3. But RealYellowPages.com only contains business listings and WhitePages.com required knowing what city petitioner lived in.

(Continued on following page)

This Court should grant the writ of certiorari to correct the lower court's erroneous interpretation of *Mullane*, *Mennonite*, and *Dusenbery*.

In addition, the Court applied an almost absolute presumption that the address that petitioner claimed as her homestead was the proper address, App. 7-8 *infra*. Of course the notice was returned to respondents thereafter so respondents could not still claim that her homestead address was proper. In *Stanley v. Illinois*, 405 U.S. 645, 656-657, 92 S.Ct. 1208, 1215 (1972), this Court explained, "Procedure by presumption is always cheaper and easier than individualized determination issues. But, when, as here, the procedure forecloses the determinative issues. . . . , when it explicitly disdains present realties in deference to past formalities, . . . [i]t . . . cannot stand." *Compare Plemons v. Gale*, 2005 WL 263658 (4th Cir. 2005) at fn. 4 with *Davis Oil Co. v. Mills*, 873 F.2d 774 (5th Cir. 1989).

When the decision of a lower court appears in conflict with prior decisions of this Court, *see e.g.*, *Lugur v. Edmondson Oil Co.*, 457 U.S. 922, 926, 102 S.Ct. 2744, 2748 (1982), this Court has not hesitated to grant the writ to bring uniformity in the law. *Mullane* and its progeny have always emphasized substance over gesture. The decision below has done the opposite.

Defendants did not know. *See* R 2-30, Freeland, statement under penalty of perjury.

CONCLUSION

This Court should grant the writ of certiorari to review the erroneous decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15455

D. C. Docket No. 02-02034 CV-TWT-1

LAURENE C. CUVILLIER,
f.k.a. Anne Harrison,

Plaintiff-Appellant,

versus

ROCKDALE COUNTY,
DANIEL G. RAY,
ALICE EDGE,
DELINQUENT TAX SOLUTIONS, INC., et al.,

Defendants-Cross-
Defendants-Appellees,

HASSAN M. SHAWAREB,
a.k.a. Hassan M. Abu-Shawareb,

Defendant-Cross-
Claimant-Appellee,

OCWEN FEDERAL BANK, FSB,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed November 18, 2004)

Before EDMONDSON, Chief Judge, and PRYOR and FAY, Circuit Judges.

PER CURIAM:

This case involves the sale of property at a tax sale. Appellant Cuvillier asks this Court to determine that the sale of her property was unconstitutional under the Constitutions of the United States and the State of Georgia. We conclude otherwise and affirm the district court.

BACKGROUND

In 1987, Appellant Cuvillier acquired residential property in Rockdale County, Georgia ("Rockdale property"). The following year, she applied for Georgia's statutory homestead tax exemption for the Rockdale property. *See* O.C.G.A. § 48-5-50 (2004). In August or September of 2000, Cuvillier moved from the Rockdale property to DeKalb County and forwarded her mail to the new address. At the DeKalb County address, she received the water bill on the Rockdale property and voter registration mailings from Rockdale County. She made no efforts to inform the Rockdale County Tax Commissioner's Office ("Rockdale Tax Office") of her change of address until January 2003, and she maintained the homestead exemption on the Rockdale property.

Cuvillier placed the Rockdale property on the market in late 2000 or early 2001, and she returned there every two to three weeks for maintenance purposes. She also legally changed her name from Anne J. Harrison in September or October of 2001, but she did not communicate this to the Rockdale Tax Office until January 2003.

Cuvillier failed to pay the 2001 tax bill on the Rockdale property. In response, the Rockdale Tax Office sent, by first class mail, a notice of delinquency to Cuvillier's Rockdale property address in January 2002.[1] The post office returned the letter to the Rockdale Tax Office.

On behalf of the Rockdale Tax Office, Appellee-Defendant Delinquent Tax Solutions, Inc. ("DTSI") sent, by certified mail, the statutorily required twenty-day notice to the Rockdale property address on 13 May 2002.[2] The letter returned to DTSI, who then delivered it to the Rockdale Tax Office. The returned notice indicated that the resident, still addressed as Anne Harrison, "moved, left no address." DTSI then began attempts to locate a proper address for Cuvillier by using websites such as

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[1] Georgia law requires tax commissioners' offices to notify taxpayers of a delinquency once payment is not received by the due date. O.C.G.A. § 48-3-3 (2004).

[2] The parties agree DTSI maintains a contract with Rockdale County. Pursuant to that contract, DTSI sends a "phase-one letter" to those taxpayers that remain delinquent after the Rockdale Tax Office sends the first delinquency notice letters. The "phase-one letter" informs the taxpayer that the account is being managed by DTSI and that the taxpayer must make payment or the property will be subject to the levy process. If the taxes are still not paid, DTSI will send, via certified mail with return service requested, a twenty-day letter as required by O.C.G.A. § 48-3-9(a) (2004). This letter typically notifies the taxpayer that the property will be "advertised for sale unless the taxes are paid within 20 days from the delivery of [the] notice." O.C.G.A. § 48-3-10 (2004). After DTSI sends the twenty-day notice letter, it begins the process of skip tracing and verifying the taxpayer's address. If the taxpayer remains delinquent, DTSI will send a ten-day notice letter. If the taxes are not paid on the property after the ten-day letter, Georgia counties may sell the property to obtain the necessary revenue. *See* O.C.G.A. § 48-4-1 (2004). Letters returned to DTSI are given to Rockdale County.

"WhitePages.com," and "RealYellowPages.com."[3] These searches failed to locate Cuvillier at her DeKalb County residence.

By at least 6 June 2002, the Rockdale Tax Office published a notice of the tax sale in the local newspaper, the "Rockdale Citizen." Because the internet searches proved futile, on 21 June 2002, DTSI sent, via certified mail, the ten-day letter to Anne J. Harrison at the Rockdale property address. The ten-day letter explained that Rockdale County would sell the property in a tax sale on 2 July 2002. Defendant-Appellant Shawareb purchased the tax lien on the Rockdale property on 2 July 2002.

Cuvillier brought this action pursuant to 42 U.S.C. § 1983 and Georgia law, alleging that the tax sale was improper. The district court granted Defendants-Appellees' motions for summary judgment, concluding that Cuvillier received reasonable notice of the tax sale.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, and we resolve all issues of material fact in favor of the non-moving party, Plaintiff-Appellant Cuvillier. *Zipperer v. City of Ft. Myers,* 41 F.3d 619, 622 (11th Cir. 1995).

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[3] The parties dispute whether DTSI used "PeopleSearch.com," a more thorough internet based search engine. For the purposes of this appeal, we presume DTSI did not use the search engine.

DISCUSSION

Cuvillier argues that Defendant-Appellees Rockdale County, Daniel Ray (Rockdale County Tax Commissioner), Alice Edge (Rockdale County Tax Commission Supervisor) and DTSI violated her due process rights by not providing her with reasonable notice of the tax sale of the Rockdale property.[4] She also contends that Appellee Abu-Shawareb is liable under a theory of money had and money received. We affirm the district court.[5]

The crux of Cuvillier's claim is that the Rockdale Tax Office did not "do more" to notify her of the tax sale of the Rockdale property.[6] The "Due Process Clause . . . requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." *Dusenbery v. United States,* 122 S. Ct. 694, 701 (2002). Thus, reasonable – not actual – notice is required, and "improvements in the reliability of new procedures [do not]

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[4] Cullvier raises several other arguments, including the availability of the qualified immunity defense for Defendant-Appellees Ray and Edge, whether the Rockdale Tax Office is a state or county office, and whether DTSI may assert a defense based on good faith. These issues are immaterial because we conclude no underlying constitutional violation exists.

[5] We note that Cuvillier's claim may possibly be barred by our decision in *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994). Defendants-Appellees, however, failed to raise a *McKinney* challenge, and we do not address one here.

[6] Whether Cuvillier appeals her claims under the United States Constitution, the Georgia Constitution, or both is unclear. In this case, we believe whether Cuvillier relies on one or the other is a distinction without a difference. When deciding cases involving the notice required for a tax sale or forfeiture, the Georgia Supreme Court relies on Supreme Court authority to interpret its Constitution. *See Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81 (Ga. 2003).

necessarily demonstrate the infirmity of those that were replaced." *Id.* at 702.

Cuvillier submits that Defendants-Appellees' acts – failing to find her proper address after the notices sent to the Rockdale property were returned – do not meet the *Dusenbery* standard. She relies on several cases from other circuits where governments forfeited property after receiving a returned notice letter. *See, e.g., United States v. Ritchie,* 342 F.3d 903, 910 (9th Cir. 2003) (no efforts, other than notice by publication, made after initial notice returned); *Foehl v. United States,* 238 F.3d 474, 479 (3rd Cir. 2001) (same) (coordinating law enforcement offices possessed defendant's proper address); *Small v. United States,* 136 F.3d 1334, 1338 (D.C. Cir. 1998) (defendant in government's custody when notice returned); *United States v. Rodgers,* 108 F.3d 1247, 1252-53 (10th Cir. 1997) (government mailed notice letter to two of three known addresses of defendant); *Barrera-Montenegro v. United States,* 74 F.3d 657, 660-61 (5th Cir. 1996) (government possessed defendant's address and defendant's counsel's address). As recognized by the district court, those cases involved situations where the government either knew the defendant's proper address or, upon receipt of the returned notice, failed to take any efforts to determine the proper address.[7]

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[7] Cuvillier asserts that Defendant-Appellee Ray had access to the Rockdale County Water Department's billing records, which would have provided him with Cuvillier's address in DeKalb County. Nothing supports this claim however. Defendant-Appellee Edge testified that, if a computer in the Rockdale Tax Office was connected to the Water Department, it would be Defendant-Appellee Ray's. Ray testified that the Water Department's records only recently became available and that he cannot recall whether he would have had access to the billing

(Continued on following page)

Appellees rely on a case from the Eighth Circuit, *Madewell v. Downs,* 68 F.3d 1030 (8th Cir. 1995). Similar to those cases cited above, the notice provided in *Madewell* was returned to the government (Drug Enforcement Agency). Unlike those cited by Cuvillier, however, the DEA in *Madewell* lacked the defendant's proper address, and the defendant was not in federal custody when the DEA sent the notice. *Id.* 68 F.3d at 1047. In addition, the defendant in *Madewell* provided the DEA with a false address, leading the court to conclude that "[a]ny confusion about [his] actual residence was the result of [the defendant's] own conduct, not the result of a willful failure to send notice to an address the DEA knew or should have known." *Id. Accord Donat v. DEA,* 121 F.3d 707 (6th Cir. 1997) (unpublished).

We must examine the particular circumstances of the case at hand to determine "whether a particular method of notice is reasonable." *Tulsa Prof'l Collection Servs., Inc., v. Pope,* 108 S. Ct. 1340, 1344 (1988). We conclude that this case is more like *Madewell* than the Ritchie line of cases. The county Defendants-Appellees undertook sufficient efforts to provide reasonable notice, and any error is, in significant part, the result of Cuvillier's own conduct. The Rockdale Tax Office acted in a manner reasonably calculated to provide adequate notice. It sent an initial notice to the address claimed by Cuvillier as her residence "for all purposes whatever." O.C.G.A. § 48-5-40(3)(K) (2004)

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records at the time at issue here. Even if we determined that Ray's access would be a material fact, to overcome summary judgment, Cuvillier must do more than allege, without factual support, Ray's access to the Water Department's records when Ray and Edge specifically refute that allegation.

(describing the effect of the homestead exemption). It also checked the local deeds and records, and then took the additional step of contacting an independent, outside locating agency to find Cuvillier's address.[8] These acts complied with state and constitutional provisions. Cuvillier's conduct also played a significant role in her failure to receive actual notice of the tax sale. First, she maintained the homestead exemption on her Rockdale property, even though she did not live there. Second, Cuvillier changed her name, compounding the difficulty in locating her proper address. Third, she did not notify the Rockdale Tax Office of either her name change or her change of address. Under these circumstances, the Rockdale Tax Office acted reasonably; that is all the Constitution requires.

Accordingly, we AFFIRM the decision of the district court.

AFFIRMED.

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[8] That DTSI could have carried out a more thorough search is immaterial. *Dusenbery* indicates that governments are not required to make the "best" efforts, but only those that are "reasonably calculated" to provide proper notice. 122 S. Ct. at 702. As far as the county Defendants-Appellees are concerned, DTSI's search methods represented, at a minimum, "reasonably diligent efforts beyond the use of tax and real estate records." *Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LAURENE C. CUVILLIER, fka Anne Harrison, Plaintiff, v. ROCKDALE COUNTY, et al., Defendants.	CIVIL ACTION FILE NO. 1:02-CV-2034-TWT

ORDER

(Filed Sep. 26, 2003)

This action involves a tax sale of real property. The Plaintiff Laurene Cuvillier contends that she was not provided with notice and hearing before being deprived of her property, as required by the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraph I of the Georgia Constitution. Each of the Defendants in this action moved for summary judgment [Docs. 26, 27, 28, & 29] as did Plaintiff [Doc. 30]. For the reasons set forth below, Defendants' motions are granted, and Plaintiff's motion is denied.

I. BACKGROUND

Plaintiff Laurene Cuvillier, formerly known as Anne Harrison, is a resident of DeKalb County, Georgia. Defendant Rockdale County is a political subdivision of the State of Georgia. Defendant Daniel Ray was, at all times relevant to this lawsuit, the Tax Commissioner for Rockdale County. Defendant Alice Edge was, at all times relevant to this lawsuit, the supervisor of the property tax

department in the Rockdale County Tax Commissioner's Office. Defendant Delinquent Tax Solutions, Inc. ("Tax Solutions"), is a Georgia corporation, and had a contract with Rockdale County to provide notice to persons who are delinquent on their property taxes. Finally, Defendant Hassan M. Abu-Shawareb was the successful bidder at the tax sale where Plaintiff's property was sold.

In June of 1987, Plaintiff – then known as Anne Harrison – took title to residential property located at 765 Clubhouse Drive, Conyers, Georgia. (Cuvillier Dep., Ex. 1.) In February of 1988, Plaintiff applied for a statutory homestead exemption with respect to that property. (Cuvillier Dep., Ex. 2.) Plaintiff maintained 765 Clubhouse Drive as her homestead exemption property until the parcel was sold to Shawareb at a tax sale in July of 2002. Plaintiff maintained her exemption despite the fact that in August or September of 2000, she moved to 2068 Silversmith Lane in unincorporated DeKalb County. (Cuvillier Dep. at 26-27; Ray Aff. ¶ 3.) In September or October of 2001, Plaintiff legally changed her name from Anne Harrison to Laurene Cuvillier. (Cuvillier Dep. at 8.)

Plaintiff never notified the Rockdale County Tax Commissioner's Office of her change in residence or of her name change until after the initiation of this suit. (Cuvillier Dep. at 56.) Other government entities, such as the Rockdale County Water Department, did have a forwarding address for Plaintiff, but the Rockdale County Tax Commissioner's Office continued to send correspondence to her 765 Clubhouse Drive address under her former name. (Cuvillier Aff. ¶ 4-6.) Plaintiff did not pay her 2001 property tax assessment for the Clubhouse Drive property. She did not think that the county would do anything about this immediately. (Cuvillier Aff. ¶ 9.) When Plaintiff failed to

pay her 2001 property tax bill, the Rockdale County Tax Commissioner's Office sent a delinquency notice to 765 Clubhouse Drive. (Ray Dep. at 6-7.) That notice was returned undelivered. (*Id.* at 7.)

Pursuant to its contract with the Rockdale County Tax Commissioner's Office, Tax Solutions took steps to notify Plaintiff that her property would be sold if her property taxes were not paid. Tax Solutions first sent out a "phase one" letter[1] advising Plaintiff that failure to pay her taxes could result in the County levying on her house to satisfy the tax obligation. (Yaun Dep. at 10-11.) Thereafter, on May 13, 2002, Tax Solutions sent the notice required by O.C.G.A. § 48-3-9(a) to the 765 Clubhouse Drive address. (*Id.* at 11-12, 16-17.) That notice was returned undelivered, and indicated the reason for non-delivery as "Moved, Left No Address." (Def.'s Ex. F.) Following the return of that notice, Tax Solutions searched for an additional address for Plaintiff by using three internet databases: Peoplesearch.com, Realpages.com, and Whitepages.com, all of which can be used to locate addresses for individuals. (*Id.* at 13.) Finding no alternate address, Tax Solutions sent the notice required by O.C.G.A. § 48-4-1 to 765 Clubhouse Drive on June 21, 2002. (*Id.* at 17.) Plaintiff never actually received any of the notices required by the Georgia statutes. (Cuvillier Aff. ¶ 10.)

As Plaintiff failed to pay the property tax owed on 765 Clubhouse Drive, the Rockdale County Tax Commissioner's

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[1] Tax Solutions sends its correspondence in envelopes marked "Return Service Requested" pursuant to which, if the United States Postal Service has a forwarding address, they will provide it to Tax Solutions for an additional charge. (Yaun Dep. at 15.)

Office published notice of the tax sale in the *Rockdale Citizen,* a newspaper circulated in Rockdale County. (Def.'s Ex. H.) Following that publication, the property was sold on July 2, 2002 to Shawareb for $124,000.00 at a tax sale. (Sharaweb Aff. ¶ 2; Cuvillier Aff. ¶ 19.) Plaintiff filed this action on July 23, 2002.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue is material if it "might affect the outcome of the suit under the governing law." *Id.* The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-159 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986).

III. DISCUSSION

Plaintiff contends that the procedures used by Defendants to notify her of the pending tax sale of her property

fail to satisfy the due process requirements of notice and hearing under the United States and Georgia Constitutions. Defendants contend that Plaintiff received the due process required by federal law, and that this Court should exercise its discretion to dismiss the pendent state law claims under 28 U.S.C. § 1367(c).

Before the Rockdale County Tax Commissioner's Office can legally levy Plaintiff's property at 765 Clubhouse Drive, it must provide Plaintiff with procedural due process. Plaintiff was entitled to notice and an opportunity to be heard regarding the potential tax sale of her property. *Dusenbery v. United States,* 534 U.S. 161, 167 (2002). Though actual notice is not required, the notice must be such as is reasonably calculated to provide actual notice under all the circumstances. *Id.* at 168.

In Georgia, all non-exempt property is subject to property taxes. To ease the burden on homeowners, the State of Georgia allows a homestead exemption to reduce the tax burden on the property "actually occupied as the permanent residence and place of abode by the applicant awarded the exemption." O.C.G.A. § 48-5-40(1)(K). Plaintiff applied for and received her homestead exemption on the 765 Clubhouse Drive property. Plaintiff was entitled to have the exemption every year "so long as the owner remains in continuous occupation of the residence as a homestead." O.C.G.A. § 48-5-45(d). As discussed above, Plaintiff moved from her 765 Clubhouse Drive property in 2000, but she failed to notify the Rockdale County Tax Commissioner's Office that she was no longer entitled to a homestead exemption due to her change in residence. By availing herself of the Georgia statutory homestead exemption, Plaintiff represented to the Rockdale County Tax Commissioner's Office that 765 Clubhouse Drive was

her permanent residence. Not surprisingly, Defendants used the homestead exemption address for giving Plaintiff notice that her taxes were overdue, and that if not paid, her property would he sold.

The Rockdale County Tax Commissioner's Office and Tax Solutions were both aware that mailings sent to the 765 Clubhouse Drive address were not actually delivered to Plaintiff. However, the United States Postal Service did not have a forwarding address for Plaintiff, and the Web-based searching performed by Tax Solutions turned up no additional contact information for her. Thus, in compliance with the Georgia Code, Defendants continued to send the required notices to the only address they had – Plaintiff's homestead exemption address. Finally, before the property was actually sold, notice of the impending sale was published in a newspaper circulated in Rockdale County.

In *Smith v. Cliffs on the Bay Condominium Ass'n,* 617 N.W.2d 536 (Mich. 2000), the Michigan Supreme Court dealt with a due process claim and a set of facts similar to those here. The plaintiff in that action was seeking to quiet title to a parcel of property purchased at a tax sale. The defendant contended that it owned the property since it was not provided notice and hearing with respect to the tax sale when the plaintiff purchased the land. The defendant failed to receive notice because it changed addresses over time, and though it notified the state Corporation and Securities Bureau of such, defendant failed to give similar notice to the taxing authority. *Id.* at 538. The taxing authority sent notices of delinquent taxes and the impending sale to the defendant, but they were returned as undeliverable. *Id.* Nevertheless, the taxing authority continued to send notices to the same address, and when the taxes were not paid, the land was sold. *Id.* at 538-39.

The Michigan Supreme Court found that due process was satisfied. The court said, "[m]ailed notice must be directed to an address reasonably calculated to reach the person entitled to notice" and that "[t]he fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located." *Id.* at 540-41. The court specifically rejected the notion that the county had to take on additional effort to locate alternate addresses for the defendant when the defendant's record address was used. *Id.* at 539-40. Instead, relying on the address of record provided to the taxing authority was sufficient to satisfy due process.

Similarly, in *Elizondo v. Read,* 588 N.E.2d 501 (Ind. 1992), the Supreme Court of Indiana determined that due process was satisfied when the taxing authority sent notice of a tax delinquence and sale to the last known address of a property owner, even though the post office returned previous mailings as undeliverable with no forwarding address. *Id.* at 502-505. In that case, the property owners moved several times after taking title to a parcel of land, but never notified the taxing authority of these moves. The taxing authority continued to send notices to the old record address for the property owners, even though it had other listings for them available in its records. *Id.* at 504. Citing the fact that due process decisions have wide implication for what must be done in a given circumstance, the court declined to hold that the taxing authority must speculate about whether similar listings reference identical people. *Id.* at 505. Instead, sending notice to the most recent record address was sufficient to satisfy due process.

In this case, the evidence shows that Defendants did afford Plaintiff procedural due process before selling her property. Defendants relied on the representation of Plaintiff in her homestead application that she resided at the 765 Clubhouse Drive property, and they sent notice to that address. This alone would be enough to satisfy due process under the *Smith* and *Elizondo* decisions, however, Defendants went further. Tax Solutions, acting on behalf of the Rockdale County Tax Commissioner's Office, requested additional information from the United States Postal Service and also performed multiple Web-based inquiries to discover Plaintiff's whereabouts. When those efforts failed to turn up an additional address, Defendants sent the statutory required notice to the most recent address on record – 765 Clubhouse Drive in Conyers, Georgia. As there was no forwarding address available for Plaintiff the Web-based searches for Plaintiff proved unfruitful, and since Plaintiff claimed a homestead exemption on the subject property, sending notice of the impending tax sale to the homestead exemption address, combined with publication in a local newspaper, was reasonably calculated under all the circumstances to provide her with actual notice. That there was no actual notice is immaterial.

Plaintiff contends that additional methods of searching for her would have proven fruitful, giving Defendants an additional address to find her and provide her with notice of the impending tax sale. Due process does not require that a taxing authority do everything possible to give notice. Rather, the issue is what is "reasonable" under the circumstances. As noted by the Michigan Supreme Court in *Smith:*

> No matter what efforts are made to give notice, the owner who has not, in fact, been provided notice will always contend that something more could have been done. This will make the process of tax sales completely unpredictable, destroying the government's ability to recoup unpaid taxes by foreclosing and reselling. For due process purposes, the focus must be on the adequacy of the [procedure used] and not on whether some additional effort in a particular case would have in fact led to a more certain means of notice.

617 N.W.2d at 542; *see also Elizondo v. Read* 588 N.E.2d at 505. That it may have been possible to find Plaintiff through other means is not the issue; rather, the issue is whether due process was satisfied by what was actually done. As discussed above, Defendants sought additional addresses from the United States Postal Service and from the Web. They also relied on Plaintiff's homestead exemption address where she was supposed to reside, and published a notice in a local newspaper. Under these facts, this Court has no trouble concluding that Defendants' actions were reasonably calculated under all the circumstances to provide Plaintiff with notice of the pending tax sale of her property.

Plaintiff cites numerous decisions from other state courts which she claims support her position that the failure to do more to find her new address amounts to a deprivation of due process. This Court disagrees. In each of the cases cited by Plaintiff, the taxing authority had additional addresses for the delinquent tax payer readily available, or failed to show how it obtained any address at all. *See, e.g., RTC Mortg. Trust v. Fry*, 730 A.2d 476, 477-78 (Pa. 1999) (forwarding address provided by the United States Postal Service); *Bank of America v. Giant*, 78 Cal.

App. 4th 1267, 1271 (Cal. App. 2000) (county obtained notice address from trust deed); *Patrick v. Rice,* 814 P.2d 463, 465-66 (N.M. App. 1991) (taxing authority had new address in computer files and on personal check); *Cunha v. Thanawitsuk,* 703 A.2d 1118, 1119 (R.I. 1997) (no evidence presented at all regarding what taxing authority did to ascertain address). The instant case is distinguishable, because an alternate addresses was not readily available, Plaintiff represented in her homestead application that 765 Clubhouse Drive was her residence, and because Defendants did make an effort to locate an alternate address for Plaintiff. As discussed above, under all the circumstances, Defendants' actions were reasonably directed at providing actual notice to Plaintiff. The cases cited to the contrary are not persuasive.

Finally, Plaintiff contends that this Court cannot place any weight on the fact that she maintained her homestead exemption after moving from 765 Clubhouse Drive to DeKalb County. Plaintiff cites *Turner v. Board of County Tax Assessors,* 71 Ga. App. 374 (1944), for the proposition that a person can have two homes and claim one as her homestead while living in the other. Plaintiff's reading of that case is strained at best. The facts of that case show that the taxpayer maintained her homestead property as her permanent home, that her personal property was kept there, that her parents lived there, that she returned to the house twice each year staying for extended periods of time, and that she intended, upon termination of her North Carolina employment, to live in her homestead exemption property. *Id.* at 374-76. The court held that though a taxpayer does not have to live in a residence every day of the year, there must be such occupancy that the facts are not inconsistent with maintenance of the

dwelling as a homestead and place of abode. *Id.* at 377. Such a holding is consistent with the decision in this case: by claiming a homestead exemption on the 765 Clubhouse Drive property, Plaintiff asserted that it was her permanent residence or "place of abode." Such a representation, combined with Defendants' efforts to find an address elsewhere through the United States Postal Service and Web-based searches, makes the decision to send notice to the homestead exemption address and publication in a local paper reasonable under all the circumstances. Plaintiff received due process, and summary judgment for Defendants is proper.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions for Summary Judgment [Docs. 26, 27, 28 & 29] are GRANTED and Plaintiff's Motion for Summary Judgment [Doc. 30] is DENIED. Additionally Defendants' Motion for Judgment on the Pleadings [Doc. 11] is DENIED as moot. Pursuant to the discretion granted to this Court under 28 U.S.C. § 1367(c), Plaintiff's state law claims are DISMISSED without prejudice.

SO ORDERED, this 26 day of September, 2003.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge